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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 444

ALBERT J. WILD,

Petitioner,

v.

BENNETT Y. BREWER, Revenue Agent of the Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
ARGUMENT	6
I. IT IS IMPORTANT TO THE PRESERVATION OF THE SUBSTANCE AND SPIRIT OF THE FIFTH AMENDMENT AND TO THE FAIR ADMINISTRATION OF JUSTICE THAT THIS COURT SHOULD REVIEW THE PRINCIPAL QUESTION PRESENTED AND REVERSE THE DECISION BELOW	6
II. IT IS IMPORTANT TO THE PRESERVATION OF THE SUBSTANCE AND SPIRIT OF THE FOURTH AMENDMENT AND TO THE FAIR ADMINISTRATION OF JUSTICE THAT THE DECISION BELOW SHOULD BE REVERSED	10
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	21a

CASES CITED

Boren v. *Tucker*, 239 F. 2d 767 (9th Cir.)	12
Contra, Foster v. *United States*, 265 F. 2d 183 (2d Cir.)	12
Daniels, Application of, 140 F. Supp. 322 (S. D. N. Y.)	9

PAGE

Grant v. *U. S.* (1912) 227 U. S. 74 ..... 1, 4, 7
Grant v. *United States*, 227 U. S. 74 (1913) 6
House, Application of, 144 F. Supp. 95, 101 (N. D. Cal.) 9
Howard, Application of, 210 F. Supp. 301 (W. D. Pa.) 9
Howard, Application of, 210 F. Supp. 301, 303 (W. D. Pa.) 12
Lash v. *Nighosian*, 273 F. 2d 185 (1st Cir.), *cert. denied*, 362 U. S. 904 12
Magnus, Mabee & Reynard, Inc., In re 311 F. 2d 12, 16 (2nd Cir.) 12
Malloy v. *Hogan*, 84 S. Ct. 1489, 1493 8
Myers, Application of, 202 F. Supp. 212 (E. D. Pa.) 10
O'Connor v. *O'Connell*, 253 F. 2d 365 (1st Cir.) 12
Subpoena Duces Tecum, In re 81 F. Supp. 418 (N. D. Cal.) 9
Ullmann v. *United States*, 350 U. S. 422 8
United States v. *Boccuto*, 175 F. Supp. 886, 889 (D. N. J.) 9
United States v. *Brasley*, 268 Fed. 59 (W. D. Pa.) .. 10
United States v. *Cary*, 218 F. Supp. 298 (D. Del.) .. 12
United States v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y.) 9
United States v. *Linen Serv. Council*, 141 F. Supp. 511 (D. N. J.) 9
United States v. *Lipshitz*, 132 F. Supp. 519, 521 (E. D. N. Y.) 10
United States v. *O'Connor*, 118 F. Supp. 248 (D. Mass.) 11
United States v. *Onassis*, 125 F. Supp. 190, 210 (S. D. N. Y.) 9
United States v. *Onassis*, 133 F. Supp. 327 (S. D. N. Y.) 10
United States v. *Powell*, 325 F. 2d 914 (3rd Cir.) .. 12
United States v. *White*, 322 U. S. 694 ..... 8, 9
Wheeler v. *United States*, 226 U. S. 478 (1913) 6
Wilson v. *U. S.* (1911) 221 U. S. 361 ..... 2, 4, 6, 7

STATUTES

PAGE

28 U. S. C.
Section 1254(1) 2

Constitution of the United States
Fourth Amendment 2, 3, 4
Fifth Amendment 2, 3, 5, 6, 7

Internal Revenue Code
Section 7602 ..... 2, 3, 11, 12
Section 1371-1377 (1954) 7

AUTHORITIES

Burns, *Searches and Seizures: The Suppression of Evidence*, N. Y. U. 20th Inst. on Fed. Tax 1081, 1087 (1962) 10

Comment, 46 Iowa L. Rev. 632, 636-637 (1961) 6

Fuller, *The Incorporated Individual: A Study of the One-Man Company*, 51 Harv. L. Rev. 1573 (1938) 6

cf. Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960) 7

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No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case entered on June 2, 1964.

OPINIONS BELOW

The first opinion of the Court of Appeals, upholding the Fifth Amendment Constitutional claim of petitioner, with Judge Koelsch dissenting, is reported at 329 F. 2d 924 and is reprinted in Appendix A hereto.

The second opinion of the Court of Appeals, entered in substitution of the Court's prior opinion and rejecting petitioner's claim "on the authority of *Grant* v. *U. S.*

(1912) 227 U. S. 74 and *Wilson* v. *U. S.* (1911) 221 U. S. 361," with Judge Madden dissenting, is as yet unreported and is reprinted in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are:

(1) Whether an individual under criminal investigation should be deprived of the protection of the United States Constitution Fifth Amendment's privilege against self-incrimination, properly invoked in response to an attempt by the investigating authority to compel production of his business records, because he has conducted his business as the sole stockholder of a one-man corporation?

(2) If so, whether, in the circumstances here presented, the attempt to compel such disclosure by administrative subpoena under § 7602 of the Internal Revenue Code is violative of the United States Constitution Fourth Amendment's prohibition against unreasonable searches and seizures?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves both the Fifth and Fourth Amendments to the Constitution of the United States and § 7602 of the Internal Revenue Code, all of which provisions are set forth in Appendix C hereto.

STATEMENT OF THE CASE

This case involves the Constitutional claims of petitioner, properly invoked under the provisions of the Fifth and Fourth Amendments, in response to the issuance by respondent, a Special Intelligence Agent investigating petitioner for alleged criminal conduct or error, of an administrative summons issued under § 7602 of the Internal Revenue Code to testify and produce certain records and respondent's application to the United States District Court for the District of Arizona for a writ of body attachment to compel petitioner to testify notwithstanding his Constitutional claims. The records subpoenaed were designated records of Air Conditioning Supply Company and certain other business records ("Ledger of memorandum accounts kept by bookmaker (Yousem et al)") (R. 7-8 and 40-41) and the summons was addressed to "Albert J. Wild, President, Air Conditioning Supply Company."

At the hearing before the District Court, after issuance of the writ of attachment, it was established that petitioner was, and always had been, the sole stockholder of Air Conditioning Supply Co., a corporation which he organized and controlled in all respects and the books and records of which he maintained in his personal possession at his residence. (R. 53-54, 56.) Prior to the filing of any articles of incorporation, petitioner had conducted his business in similar fashion as a sole proprietor under the same name. (R. 36.) Respondent had been engaged in his criminal investigative work concerning petitioner since about January 15, 1963, his office being exclusively concerned with criminality. (R.48-49, 43.) The reason for issuance of the summons or the necessity thereof was not in any way stated at the hearing.

Upon the foregoing, the District Court entered findings of fact and conclusions of law holding, with respect to petitioner's Constitutional claims, that "the privilege against self-incrimination and unreasonable search and seizure cannot be claimed by a corporation," concluding that respondent was entitled to the books and records designated and directing petitioner to produce them. (R. 10-12.)

On appeal, the Court of Appeals, omitting any reference to respondent's reliance also upon the Fourth Amendment, first held, in an opinion by Judge Madden to which Judge Koelsch dissented, that the better reason supported petitioner's entitlement to claim the protection of the Fifth Amendment and directed that the order appealed from be set aside and the application of respondent dismissed. Thereafter, respondent petititioned for rehearing en banc and thereupon, with Judge Madden dissenting, rehearing was granted upon the written memoranda filed and, at the same time, the prior opinions of Judge Madden and the dissenting opinion of Judge Koelsch were withdrawn and in substitution therefor there was filed an opinion by Judges Merrill and Koelsch briefly affirming the judgment below "on the authority of *Grant* v. *U. S.* (1912) 227 U. S. 74 and *Wilson* v. *U. S.* (1911) 221 U. S. 261" and a thorough dissenting opinion by Judge Madden.

REASONS FOR GRANTING THE WRIT

The essential reasons why the writ sought should be granted, briefly stated, are as follows:

First, taking into account the modern-day prevalence—facilitated and in effect encouraged by the development of business organization law—of the one-man corporation as

a preferred mode of small business organization, the true import of the case may be seen as deciding whether the Fifth Amendment is to retain, or be blighted of, significance in the setting of today's reach of the government against the indivdual in his ordinary affairs. A question of such moment surely deserves the attention of this Court. The necessity and timeliness of the granting of a writ in this case to determine that question is testified to by the fact that the present state of law, as found by the Court of Appeals, apparently is based on a 1913 decision of this Court which, as Judge Madden's decision perceptively points out, (i) was merely syllogistic in approach, based on an earlier quite different case without specific consideration of the distinctive position of the incorporated indiviual, and (ii) appears to be in conflict with the more recent decisions and reasoning of this Court in Fifth Amendment cases.

Second, this case presents a poignant issue as to the fair administration of criminal justice since the present decision, if allowed to stand, would require discrimination as to the availability of the safeguard of the Fifth Amendment privilege against self-incrimination between different persons based merely on organizational form rather than substance.

Third, this case also raises the question of whether, despite the Fourth Amendment, self-incriminating disclosure may be compelled in a criminal investigation merely by the issuance of an administrative subpoena (without benefit even of any showing that such invasion of Constitutional right is warranted or required). That question alone deserves explicit consideration by this Court to provide a further direction that, despite the drive of Special Intelligence Agents to convict, Constitutional right should be fully preserved and respected.

Argument

I

IT IS IMPORTANT TO THE PRESERVATION OF THE SUBSTANCE AND SPIRIT OF THE FIFTH AMENDMENT AND TO THE FAIR ADMINISTRATION OF JUSTICE THAT THIS COURT SHOULD REVIEW THE PRINCIPAL QUESTION PRESENTED AND REVERSE THE DECISION BELOW.

Since this Court considered the applicability of the Fifth Amendment's privilege against self-incrimination with respect to the production of corporate records—in *Wilson* v. *United States*, 221 U. S. 361 (1911), *Wheeler* v. *United States*, 226 U. S. 478 (1913) and *Grant* v. *United States*, 227 U. S. 74 (1913)—the conditions affecting the organization and operation of individual enterprises in the United States have undergone radical change. In particular, with encouragement of new individual enterprises always in mind, our laws have facilitated the utilization by individuals of the corporate form of business organization and the one-man company in result has been popularly employed. Nevertheless, realistically—and there is every reason in a case such as this one involving an important Constitutional provision to so view the matter, avoiding fictitious theory "in an atmosphere of make-believe"—it still is well understood that the one-man corporation is truly a sport in corporate law and in almost all circumstances is merely the other name, the instrument, or, as the cases say, the *alter ego* of the individual. See, *e.g.*, Fuller, *The Incorporated Individual: A Study of the One-Man Company*, 51 Harv. L. Rev. 1573 (1938); Comment, 46 Iowa L. Rev. 632, 636-637 (1961). So much has the ambivalent position of the closely held corporation been acknowledged that, even with respect to income taxes, Congress has allowed the stockholders of a closely-held

corporation (with less than ten stockholders) to elect to be taxed as if there were no corporation. Internal Revenue Code of 1954, § 1371-1377. In that setting it is respectfully submitted that there is not any reason of weight why the incorporated individual should be deprived of the protection of the Fifth Amendment merely because of his incorporation. As Judge Madden so tellingly stated in his dissenting opinion below, the situation of the multiply-owned corporation "has no application whatever to Wild's situation" and "the argument that one who incorporates has only himself to blame if he thereby forfeits his constitutional rights is not of Constitutional weight." See also Comment, 46 Iowa L. Rev. 632; *cf.* Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

Indeed, the majority opinion below, rendered by most conscientious judges, did not purport to state a reasoned result but instead frankly declared that the decision was rested entirely "on the authority of" the *Grant* and *Wilson* cases, *supra*. (Although the *Grant* case in the main has been understood as merely a reaffirmation of the *Wilson* ruling that corporations as such were not entitled to invoke the privilege against self-incrimination and the actual holding appeared justified on unrelated grounds, the decision does constitute an impediment to fresh consideration of the question presented.) Accordingly, unless the writ here sought is granted, however much reason may rebel against the result, frustration of a vital Constitutional right will necessarily continue.

Moreover, such a result, ironically, would appear to be inconsistent with at least the spirit of the more recent Fifth Amendment decisions of this Court, providing a further compelling reason for granting the writ in this case. Again as stated by Judge Madden:

> ". . . nothing which the Supreme Court has decided or said in the last two decades can be recon-

> ciled with the view that a dry syllogistic approach could compel an individual to produce his own papers from his own possession to assist his government to convict him of crime. The language of the Court in *Ullman, supra,* in 1956; that of the Court in *White, supra,* in 1944, seems to me to say that the Court will not decide a question of the constitutional right of an individual on the basis of a dry syllogism such as that General Motors is a corporation and its president could not refuse to produce its records on the ground that they might incriminate him; Air Conditioning Supply Company is a corporation, therefore its president, though he is the sole owner of the corporation and its records, cannot refuse to produce its records."

It will be recalled that the decisions referred to, well analyzed in Judge Madden's opinion, are *Ullmann* v. *United States,* 350 U.S. 422, in which the Court defined explicitly the spirit in which the Fifth Amendment provision against self-incrimination should be approached, directing that "This contitutional protection must not be interpreted in a hostile or niggardly spirit," and *United States* v. *White,* 322 U. S. 694, in which the Court eschewed any mechanical organizational test in deciding whether or not a labor union was entitled to invoke a personal privilege (the subpoena in that case having been directed to the union alone) and instead declared that:

> "The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constitutents but rather to embody their common or group interests only." [322 U. S. at 701.]

See also the statement of the Court in *Malloy* v. *Hogan,* 84 S. Ct. 1489, 1493, recognizing that ". . . the American

system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." For other cases following the lead of the *White* case in rejecting any mechanical, absolute test, *cf. Application of Howard*, 210 F. Supp. 301 (W. D. Pa.), excluding from an order directing the production of corporate records any item of "a personally owned company in which no other person other than the sole stockholder has any pecuniary interest"; *Application of Daniels*, 140 F. Supp. 322 (S. D. N. Y.), as interpreted in *United States* v. *Boccuto*, 175 F. Supp. 886, 889 (D. N. J.); and *Application of House*, 144 F. Supp. 95, 101 (N. D. Cal.). In short, if the spirit of constitutional interpretation radiated in such decisions is to be made animate and if the latitude allowed in the *White* case for invocation of the Fifth Amendment privilege with respect to private papers or papers held in a purely personal capacity is ever to be given organic, effective meaning, it should be declared in this case that petitioner's Constitutional claim should be respected.

The foregoing reasons for granting the writ sought are further intensified by the unfair administration of criminal justice which otherwise will accrue. For example, the cases which have arisen in recent years, applying the test set out in the *White* case, have held that a partner of a small partnership with which the partners have maintained close identification and concerning which they have maintained control, as distinguished from "the large and impersonal partnership," may maintain the inviolability of partnership records upon a claim of privilege by one of the partners. *United States* v. *Linen Serv. Council*, 141 F. Supp. 511 (D. N. J.); *In re Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Cal.). See also *United States* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y.); *United States* v.

Onassis, 125 F. Supp. 190, 210 (S. D. N. Y.); and, for an earlier partnership case, *United States* v. *Brasley*, 268 Fed. 59 (W. D. Pa.) But see *United States* v. *Onassis*, 133 F. Supp. 327 (S. D. N. Y.). Thus, unless the decision below is reversed, the anomalous outcome will be that the Fifth Amendment privilege of the members of a partnership enterprise may be sustained but that, for the incorporated individual, the privilege would be destroyed. Surely with respect to a matter of constitutional law such a patent irrationality should be avoided and, where required, corrected.

II

IT IS IMPORTANT TO THE PRESERVATION OF THE SUBSTANCE AND SPIRIT OF THE FOURTH AMENDMENT AND TO THE FAIR ADMINISTRATION OF JUSTICE THAT THE DECISION BELOW SHOULD BE REVERSED.

It is clear from the record in this case that, despite respondent's misnomer of his status as a Revenue Agent of the Internal Revenue Service instead of, in fact, a Special Intelligence Agent (R. 33, 43), the government in this case is proceeding through respondent to seek to convict petitioner of an alleged crime, not to ascertain tax liability as such or to collect taxes. See also Burns, *Searches and Seizures: The Suppression of Evidence*, N. Y. U. 20th Inst. on Fed. Tax 1081, 1087 (1962); *United States* v. *Lipshitz*, 132 F. Supp. 519, 521 (E. D. N. Y.). Accordingly, the utilization of § 7602 of the Internal Revenue Code in the circumstances presented raises a fundamental Constitutional question as to the effect of the prohibition contained in the Fourth Amendment. As explained in *Application of Myers*, 202 F. Supp. 212 (E. D. Pa.), enjoining preliminarily the enforcement of a § 7602 summons

issued by a Special Agent (in circumstances where an indictment already had been obtained),

> "We believe the Government's purpose . . . is contrary to our fundamental and deep-seated conceptions of fair play. See United States v. O'Connor, 118 F. Supp. 248 (D. C. Mass. 1953) . . . It should not oppress a defendant who stands accused of a crime and whose liberty is at stake . . . by invoking in aid of a criminal charge the processes which Congress has authorized for the administration of the revenue laws. The court will not permit evasion of the traditional procedure in criminal trials embodied in the Federal Rules of Criminal Procedure by resort to the great administrative powers in aid of the revenue laws which are granted by Section 7602 of the Internal Revenue Code of 1954 (26 U. S. C. A. § 7602). [202 F. Supp. at 213.]

Similarly in the case cited in the *Myers* decision, *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), Judge Wyzanski denied an application for the issuance of an administrative subpoena sought by a Special Agent although only one of the purposes of the Agent was to aid in a criminal prosecution. Recognizing the limited purpose of a Treasury subpoena, the Court further emphasized that in criminal matters Congress has never vested the executive with an unrestricted subpoena power and, in a resounding opinion, stated that:

> "The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure
>
> . . . .
>
> "To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees

> of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power." [118 F. Supp. at 250-251.]

But *cf. In Re Magnus, Mabee* v. *Reynard, Inc.*, 311 F. 2d 12, 16 (2nd Cir.); *Boren* v. *Tucker*, 239 F. 2d 767 (9th Cir.) (not recognizing the special status of a Special Intelligence Agent); *Application of Howard*, 210 F. Supp. 301, 303 (W. D. Pa.).

The vice of permitting utilization of an administrative subpoena in the circumstances here presented is magnified by the fact that at no time did respondent deign to provide any explanation whatever why the summons here issued was warranted or required, his issuance of the summons apparently having been accepted as sufficient without move notwithstanding the provision of the statute that enforcement of a § 7602 administrative subpoena requires a hearing before a Judge who may enforce the summons "if satisfactory proof is made." The better reasoned cases interpreting this provision of the Code have held that the government must carry the burden of demonstrating the need for the investigation (that is, for example, where fraud is suspected, that a reasonable basis exists for a suspicion of fraud). See *United States* v. *Powell*, 325 F. 2d 914 (3rd Cir.); *O'Connor* v. *O'Connell*, 253 F. 2d 365 (1st Cir.); *Lash* v. *Nighosian*, 273 F. 2d 185 (1st Cir.), *cert. denied*, 362 U. S. 904; *United States* v. *Cary*, 218 F. Supp. 298 (D. Del.). *Contra, Foster* v. *United States*, 265 F. 2d 183 (2nd Cir.). The force of that conclusion is buttressed by the additional statutory provision in § 7605(b) that "No taxpayer shall be subjected to unnecessary ex-

amination or investigation . . ." Thus, in this case there appears what has been described as "the spectacle of administrative government run riot."

In such circumstances, the Court should not hesitate to grant relief—if for no other reason, to clear the air and have a restorative effect upon the administration of justice by Special Intelligence Agents in accordance with "traditional procedure" in criminal matters, having due regard for the requirements of the Fourth Amendment. Although the Court of Appeals did not treat this second question in its opinion, plainly it is of Constitutional weight and deserving of special consideration by this Court. In that regard, although it would appear that the issue is sufficiently precise and developed so that an expression of opinion by the Court of Appeals is not required, at the very least the case should be remanded to the Court of Appeals with the direction to consider this second question so that the entire Constitutional import of the case will be assessable and appreciated.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

August 31, 1964.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT J. WILD, *Appellant*, vs. BENNETT Y. BREWER, Revenue Agent of the Internal Revenue Service, *Appellee*.	No. 18,860

[March 19, 1964]

On Appeal from the United States District Court for the District of Arizona

Before: MERRILL, Circuit Judge; MADDEN, Judge of the Court of Claims; and KOELSCH, Circuit Judge.

MADDEN, Judge:

Brewer, an agent of the Secretary of the Treasury, served upon Wild a summons addressed to

> Albert J. Wild, President
> Air Conditioning Supply Company

requiring Wild to appear before Brewer to give testimony relating to the tax liability and or the collection of the tax liability of "the above named person" and to bring with him and produce for examination certain books and records specified in the summons. All of the books and records specified were books and records of Air Conditioning Supply Company.

Appendix A.

Wild appeared, pursuant to the summons, but refused to produce the books and records called for in summons. He gave as the reason for his refusal the fact that the production of the books and records might tend to incriminate him and thus compel him, in a criminal case, to be a witness against himself in violation of his rights under the Fifth Amendment to the Constitution of the United States, and that to compel him to produce the books and records would amount to an unreasonable search and seizure, in violation of his rights under the Fourth Amendment to the Constitution. He stated that Air Conditioning Supply Company, though it was a corporation was owned 100 per cent by himself, and was completely controlled and directed by him.

Brewer's summons to Wild was, as it showed on its face, issued pursuant to Section 7602, Internal Revenue Code of 1954, 26 U. S. C., 1958 ed., § 7602. Section 7604 gives to the appropriate United States District Court the power, upon application by the Secretary of the Treasury or his delegate, to issue an attachment against a person neglecting or refusing to obey a summons issued under § 7602, as for contempt. Brewer made an application to the United States District Court for the District of Arizona. That court issued the attachment, held a hearing at which evidence was taken and arguments were heard, and thereafter made findings of fact and stated conclusions of law to the effect that the privilege against self-incrimination and unreasonable search and seizure cannot be claimed by a corporation; that the records requested were the property of Air Conditioning Company, Inc.; and that Brewer was entitled to get the records. The court ordered Wild to appear before the court at a specified time and produce the records.

Wild brought the instant appeal from that order of the District Court. The records were placed in escrow in a bank, and a stay was granted pending this appeal. The issue, then, in the appeal is whether Wild, who might be incriminated by what was written in the documents which were called for in the summons, could, in the circumstances, refuse to turn the documents over to the Government.

The privilege guaranteed by the Fifth Amendment, against the Government of the United States, "in any criminal case" not to be compelled to be a witness against one's self, is available not only to defendants in criminal trials but to witnesses in any kind of official proceeding under the auspices of the United States. It applies not only to the giving of oral testimony, but to the production from one's possession of incriminating documents or objects. Boyd v. United States, 116 U. S. 616, at least if the possession is coupled with a certain minimum of right. See United States v. White, 322 U. S. 694, 699.

Whether the Constitutional Fathers were wise or not in inserting this guaranty in the Constitution might now, 172 years after its insertion, be regarded as irrelevant, except that when, in a case such as the instant one, it is sought to extend the guaranty beyond the borders marked by the precedents, it may be permissible to weigh the arguments which, in this country and in England, have been advanced for and against the privilege.

In the 1911 case of Wilson v. United States, 221 U. S. 361, Mr. Justice McKenna, at page 392, in an eloquent dissenting opinion strongly urging a generous interpretation of the privilege, referred to certain critical discussions of the privilege in legal literature. He said:

> Indeed, eminent legal names may be cited in criticism, if not ridicule, of the policy expressed by the Fifth Amendment, that is, the policy of protection against self-incrimination. It is declared to have no logical relation to the abuses that are said to sustain it, and that the pretense for it, so far as based on hardship, is called an "old woman's reason," (also a "lawyer's reason,") and a "double distilled and treble refined sentimentality." So far as based on unfairness it is called "the fox hunter's reason," its basis being that a criminal and a fox must have a chance to escape, the subsequent pursuit being made thereby more interesting.

Justice McKenna cites Bentham on Judicial Evidence, 1827, vol. 5, page 229 et seq., for the foregoing. His own brief response is, "A reply would be difficult if government had no other concern than the punishment of crime."

In the 1937 case of Palko v. Connecticut, 302 U. S. 319, Mr. Justice Cardozo, speaking *obiter*, for all but one of the Justices, said:

> What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. Twining v. New Jersey, 221 U. S. 78. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Brown v. Mississippi, 297 U. S. 278. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

Appendix A

In Ullman v. United States, 350 U. S. 422, 426, 427, Mr. Justice Frankfurter said, for the Court:

> It is relevant to define explictly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached. This command of the Fifth Amendment ("nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *") registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying states. . . .

There is without question a general doctrine that an officer of a corporation who, as such officer, has custody of its records may not successfully refuse to produce those records in response to a subpoena issued to the corporation and served upon him as custodian, on the ground that the records contain material which would incriminate him. Wilson v. United States, 221 U. S. 361. In that case Mr. Justice Hughes, during his earlier period of service on the Court, wrote the opinion which directly so held. The result of the decision was that Wilson, the president of the corporation, being already under indictment by the same grand jury which subpoenaed the corporation's records,

was held to have been validly sentenced for contempt for refusal to supply to the grand jury documents which would be used to convict him of the crimes which the grand jury was investigating. His sentence for contempt was that he be committed "until he delivers to the United Wireless Telegraph Company the said books called for by said subpoena, and ceases to obstruct and impede the process of this court, or otherwise purges himself of this contempt." The other directors of United Wireless were willing to produce the records if they could get them from Wilson. Wilson's plight was an unhappy one. Was it because he did not *own* the books which he was refusing to produce? Appellant Wild in our case quotes from United States v. White, 322 U. S. 694, 699, the statement:

> * * * the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity.* (Italics added)

Wilson, of course, did not own the books nor did he have custody of them in a purely personal capacity.

A corporation does not have the Constitutional privilege against self-incrimination. It therefore cannot, if its records are subpoenaed, assert the Fifth Amendment privilege against self-incrimination. Hale v. Henkel, 201 U. S. 43. Wilson v. United States, 221 U. S. 361, 382. It may, however, complain that a search is unreasonable if the demand for production is so broad as to be unjustifiably burdensome. Essgee Co. v. United States, 262 U. S. 151, 156-158. But if a corporation, though under a duty to produce its records pursuant to a subpoena, is unable to do so because, as in Wilson v. United States, supra, the corporate officer who has custody of the records will not surrender them for production, one practical way to obtain them is

by pressure on the officer. That was done in *Wilson* by his imprisonment for contempt.

With some background in the applicable doctrine, we return to the situation of the appellant Wild and his circumstantial relation to the Constitutional privilege. His corporation as such was not, as we have seen, entitled to the privilege. He did not claim the privilege for the corporation, and could not have done so. He claims it for himself, and says that he, and not any artifical legal entity, will be the one to suffer the punishment if he is obliged to furnish to the Government the evidence which will bring about his conviction. *Wilson* made the same contention, but his contention was rejected.

Wild quoted from White v. United States, 322 U. S. 694, 701:

> The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents but rather to embody their common or group interests only.

Wild says that since he is the sole owner of his corporation, the corporation does embody the "purely private or person interests of its [only]constituent(s)," who is Wild himself.

If there are several or many or perhaps even two stockholders in a corporation, it may well be urged by those who no part in any wrongdoing by the corporation or by its president or secretary who had custody of the books that their corporation and they have a right not to be embarrassed or damaged by their officer's suppressing

the records which belong to them, and which he holds only as custodian for them. That was the situation in *Wilson*, supra. That reason has no application whatever to Wild's situation. He being the sole owner of the corporation, no one but himself can be affected by what he does with it, or to it. Before the summons was served, he could have destroyed the records, or, indeed, everything that the corporation owned, without accountability to anyone.

What we have just said seems to leave the Government with no reason for denying the Fifth Amendment privilege to Wild, except the reason that the records which he suppressed belonged to a corporation and that, therefore, *Wilson* and other precedents deny him the Constitutional privilege. But his case differs from *Wilson's* in a respect which the Supreme Court thought, in *United v. White*, supra, deserved the careful, though *obiter*, expression hereinabove quoted.

With regard to any importance which may attach to the fact that the records belonged to a corporation and were, merely for that reason, particularly subject to be made available to the United states, we confess, with deference, that the reason given in Wilson v. United States, 221 U. S. 361, 382, viz. the impliedly reserved visitatorial power of the state which created the artificial legal entity, which power somehow is transferred to the Federal Government, seems to us to be something of a make-weight in the cases in which it has been expressed. And we think that the argument that one who incorporates his business has only himself to blame if he thereby forfeits Constitutional rights is not of Constitutional weight.

We find ourselves in a borderline Constitutional area, not well defined by the precedents. We can only estimate

how the Supreme Court of the United States would decide this case. For guidance, we look to the language of that Court in Ullmann v. United States, hereinbefore quoted. We think that to deny this Constitutional privilege to Wild, in whose circumstances the reasons for denying it, which were present in other cases relied on by the Government are absent, would violate the Supreme Court's admonition that "This Constitutional protection must not be interpreted in a hostile or niggardly spirit."

The order appealed from is set aside and the proceeding is remanded to the District Court with a direction to dismiss the application of Bennett Y. Brewer.

KOELSCH, Circuit Judge, Dissenting:

Not less venerative of the guarantee of the Fifth Amendment than my colleagues, I nonetheless believe this is not a proper case for its application. No case, to my knowledge, takes the position as does the court in this decision that the privilege declared in the Fifth Amendment extend to one other than the holder. Here the papers sought are the property of the corporation; not its shareholder, sole shareholder though he may be. Neither can it be fairly said that they are "in his possession in a purely personal capacity." Reliance on the general observation that the Fifth Amendment is ". . . not to be interpreted in a hostile or niggardly spirit" seems to me to miss the mark; our inquiry must be directed to whether that Amendment is available to the appellant in these circumstances. More persuasive is *United States* v. *Guterma*, 272 F. 2d 344 (1959), identical to the instant case on its facts, which carefully accorded Fifth Amendment protection to the personal papers of the sole shareholder but denied the applicability of the privilege to records of the

corporation held by the shareholder. Quickly coming to mind is the difficulty posed for trial courts in drawing the line between corporations with but one shareholder and a closed corporation of two or more shareholders, but with one dominant shareholder; and myriad other possibilities are suggested under the rationale of the majority. The line drawn between the government's rights under a subpoena to secure corporate papers and the constitutional privileges of individuals, heretofore clear, is now obscured. I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT J. WILD,
Appellant,

vs.

BENNETT Y. BREWER, Revenue Agent of the Internal Revenue Service,
Appellee.

No. 18,860

[June 2, 1964]

On Appeal from the United States District Court for the District of Arizona

On Rehearing

MERRILL and KOELSCH, Circuit Judges:

Judgment affirmed on the authority of *Grant v. U. S.* (1912) 227 U. S. 74, and *Wilson* v. *U. S.* (1911) 221 U. S. 361.

MADDEN, Judge, dissenting:

I respectfully dissent from the decision of the court. In order to explain the reasons for my dissent, I state the facts of the case.

Brewer, an agent of the Secretary of the Treasury, served upon Wild a summons addressed to

Albert J. Wild, President
Air Conditioning Supply Company

requiring Wild to appear before Brewer to give testimony relating to the tax liability and/or the collection of the tax liability of "the above named person" and to bring with him and produce for examination certain books and records specified in the summons. All of the books and records specified were books and records of Air Conditioning Supply Company.

Wild appeared, pursuant to the summons, but refused to produce the books and records called for in the summons. He gave as the reason for his refusal the fact that the production of the books and records might tend to incriminate him and thus compel him, in a criminal case, to be a witness against himself in violation of his rights under the Fifth Amendment to the Constitution of the United States, and that to compel him to produce the books and records would amount to an unreasonable search and seizure, in violation of his rights under the Fourth Amendment to the Constitution. He stated that Air Conditioning Supply Company though it was a corporation, was owned 100 per cent by himself, and was completely controlled and directed by him.

Brewer's summons to Wild was, as it showed on its face, issued pursuant to Section 7602, Internal Revenue Code of 1954, 26 U. S. C., 1958 ed., § 7602. Section 7604 gives to the appropriate United States District Court the power, upon application by the Secretary of the Treasury or his delegate, to issue an attachment against a person neglecting or refusing to obey a summons issued under § 7602, as for contempt. Brewer made an application to the United States District Court for the District of Arizona. That court issued the attachment, held a hearing at which evidence was taken and arguments were heard, and thereafter made findings of fact and stated conclusions of

law to the effect that the privilege against self-incrimination and unreasonable search and seizure cannot be claimed by a corporation; that the records requested were the property of Air Conditioning Company, Inc.; and that Brewer was entitled to get the records. The court ordered Wild to appear before the court at a specified time and produce the records.

Wild brought the instant appeal from that order of the District Court. The records were placed in escrow in a bank, and a stay was granted pending this appeal. The issue, then, in the appeal is whether Wild, who might be incriminated by what was written in the documents which were called for in the summons, could, in the circumstances, refuse to turn the documents over to the Government.

The privilege guaranteed by the Fifth Amendment, against the Government of the United States, "in any criminal case" not to be compelled to be a witness against one's self, is available not only to defendants in criminal trials but to witnesses in any kind of official proceeding under the auspices of the United States. It applies not only to the giving of oral testimony, but to the production from one's possession of incriminating documents or objects, Boyd v. United States, 116 U. S. 616, at least if the possession is coupled with a certain minimum of right. See United States v. White, 322 U. S. 694, 699.

Whether the Constitutional Fathers were wise or not in inserting this guaranty in the Constitution might now, 172 years after its insertion, be regarded as irrelevant, except that when, in a case such as the instant one, special circumstances exist, it may be permissible to weigh the arguments which, in this country and in England, have been advanced for and against the privilege.

Appendix B

In the 1911 case of Wilson v. United States, 221 U. S. 361, Mr. Justice McKenna, at page 392, in a dissenting opinion strongly urging a generous interpretation of the privilege, referred to certain critical discussions of the privilege in legal literature. He said:

> Indeed, eminent legal names may be cited in criticism, if not ridicule, of the policy expressed by the Fifth Amendment, that is, the policy of protection against self-incrimination. It is declared to have no logical relation to the abuses that are said to sustain it, and that the pretense for it, so far as based on hardship, is called an "old woman's reason," (also a "lawyer's reason"), and a "double distilled and treble refined sentimentality." So far as based on unfairness it is called "the fox hunter's reason," its basis being that a criminal and a fox must have a chance to escape, the subsequent pursuit being made thereby more interesting.

Justice McKenna cited Bentham on Judicial Evidence, 1827, vol. 5, page 229 et seq., for the foregoing. His own brief response is, "A reply would be difficult if government had no other concern than the punishment of crime."

In the 1937 case of Palko v. Connecticut, 302 U. S. 319, Mr. Justice Cardozo, speaking *obiter*, for all but one of the Justices, said:

> What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. Twining v. New Jersey, 221 U. S. 78. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and would limit its scope or destroy it altogether. No doubt there would remain the need to give protection

against torture, physical or mental. Brown v. Mississippi, 297 U. S. 278. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.

In Ullman v. United States, 350 U. S. 422, 426, 427, Mr. Justice Frankfurter said, for the Court:

> It is relevant to define explicitly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached. This command of the Fifth Amendment ("nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *") registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying states . . .

There is without question a general doctrine that an officer of a corporation who, as such officer, has custody of its records may not successfully refuse to produce those records in response to a subpoena issued to the corporation and served upon him as custodian, on the ground that the records contain material which would incriminate him. Wilson v. United States, 221 U. S. 361. In that case Mr. Justice Hughes, during his earlier period of service on the

Court, wrote the opinion which directly so held. The result of the decision was that Wilson the president of the corporation, being already under indictment by the same grand jury which subpoenaed the corporation's records, was held to have been validly sentenced for contempt for refusal to supply to the grand jury documents which would be used to convict him of the crimes which the grand jury was investigating. His sentence for contempt was that he be committed "until he delivers to the United Wireless Telegraph Company the said books called for by said subpoena, and ceases to obstruct and impede the process of this Court, or otherwise purges himself of this contempt." The other directors of United Wireless were willing to produce the records if they could get them from Wilson. Wilson's plight was an unhappy one. Was it because he did not *own* the books which he was refusing to produce? Appellant Wild in our case quotes from United States v. White, 322 U. S. 694, 699, the statement:

> * * * the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity*. (Italics added.)

Wilson, of course, did not own the books nor did he have custody of them in a purely personal capacity.

A corporation does not have the constitutional privilege against self-incrimination. It therefore cannot, if its records are subpoenaed, assert the Fifth Amendment privilege. Hale v. Henkel, 201 U. S. 43. Wilson v. United States, 221 U. S. 361, 382. It may, however, complain that a search is unreasonable if the demand for production is so broad as to be unjustifiably burdensome. Essgee Co. v. United States, 262 U. S. 151, 156-158. But if a cor-

poration, though under a duty to produce its records pursuant to a subpoena, is unable to do so because, as in *Wilson* v. *United States*, supra, the corporate officer who has custody records will not surrender them for production, one practical way to obtain them is by pressure on the officer. That was done in *Wilson* by his imprisonment for contempt.

With some background in the applicable doctrine, we return to the situation of the appellant Wild and his circumstantial relation to the Constitutional privilege. His corporation as such was not, as we have seen, entitled to the privilege. He did not claim the privilege for the corporation, and could not have done so. He claims it for himself, and says that he, and not any artificial legal entity, will be the one to suffer the punishment if he is obliged to furnish to the Government the evidence which will bring about his conviction. Wilson made the same contention, but his contention was rejected.

Wild quotes from United States v. White, *supra*, 322 U. S. 694, 701:

> The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents but rather to embody their common or group interests only.

Wild says that since he is the sole owner of his corporation, the corporation does embody the "purely private or personal interests of its [only] constituent(s)," who is Wild himself.

If there are several or many or perhaps even two stockholders in a corporation, it may well be urged by

those who had no part in any wrongdoing by the corporation or by its president or secretary who had custody of the books that their corporation and they have a right not to be embarrassed or damaged by their officer's suppressing the records which belong to them, and which he holds only as custodian for them. That was the situation in Wilson, *supra*. That reason has no application whatever to Wild's situation. He being the sole owner of the corporation, no one but himself can be affected by what he does with it or to it. Before the summons was served, he could have destroyed the records, or, indeed, everything that the corporation owned, without accountability to anyone.

What I have just said seems to leave the Government with no reason for denying the Fifth Amendment privilege to Wild, except the reason that the records which he suppressed belonged to a corporation and that, therefore, *Wilson* and other precedents deny him the Constitutional privilege. But his case differs from Wilson's in a respect which the Supreme Court thought, in *United States* v. *White*, supra, deserved the careful, though *obiter*, expression hereinabove quoted.

With regard to any importance which may attach to the fact that the records belonged to a corporation and were, merely for that reason, particularly subject to be made available to the United States, I confess, with deference, that the reason given in Wilson v. United States, 221 U. S. 361, 382, viz. the impliedly reserved visitatorial power of the state which created the artificial legal entity, which power somehow is transferred to the Federal Government, seems to me to be something of a make-weight in the cases in which it has been expressed. And I think that the argument that one who incorporates his business has

only himself to blame if he thereby forfeits Constitutional rights is not of Constitutional weight.

I think that to deny this Constitutional privilege to Wild would violate the Supreme Court's admonition in *Ullman* that "This constitutional protection must not be interpreted in a hostile or niggardly spirit."

The court rejects Wild's claim of the privilege against self-incrimination because, in the 1913 case of Grant v. United States, 227 U. S. 74, the owner of a one-owner corporation was not permitted to assert the privilege with regard to the corporation's papers. The Supreme Court in Grant disposed of the claim of privilege in the following language:

> Although the merits of the constitutional question are thus before us, it does not require extended discussion in view of the recent decisions of this court. The books and papers called for by the subpoena were corporate records and documents. * * * They remained subject to inspection and examination when required by competent authority * * *.

It is apparent that the Court in the Grant case did not regard it as worthy of discussion that it was, in fact, compelling an individual who was the sole owner and possessor of incriminating papers, albeit his ownership of the papers rested on his ownership of the corporation which owned them. The Court's decision was syllogistic. It stated that it had recently decided, in Wilson v. United States, *supra*, that an officer of a corporation could not successfully claim the privilege for papers belonging to the corporation but which would incriminate the officer; the papers in *Grant* were corporation papers; therefore *Grant* was ruled by *Wilson*.

Appendix B

As recently as 1937, Justice Cardozo for the Supreme Court in Palko v. Connecticut, *supra*, speaking for the Court, referred sympathetically to the views of those observers who thought the privilege itself was a mischief rather than a benefit.

I suggest that nothing which the Supreme Court has decided or said in the last two decades can be reconciled with the view that a dry syllogistic approach could compel an individual to produce his own papers from his own possession to assist his government to convict him of crime. The language of the Court in *Ullman*, *supra*, in 1950; that of the Court in *White*, *supra*, in 1944, seems to me to say that the Court will not decide a question of the constitutional right of an individual on the basis of a dry syllogism such as that General Motors is a corporation and its president could not refuse to produce its records on the ground that they might incriminate him; Air Conditioning Supply Company is a corporation, therefore its president, though he is the sole owner of the corporation and its records, cannot refuse to produce its records.

The recent decisions of the Supreme Court, a few of which are Mapp v. Ohio, 367 U. S. 643 (1961); Gideon v. Wainright, 372 U. S. 335 (1963); National Association for the Advancement of Colored People v. Button, 371 U. S. 415 (1963), Massiah v. United States, ... U. S. ....., 84 S. Ct. R. 1199 (1964), seem to me to make this court's decision in the instant case anachronistic.

APPENDIX C

Constitution of the United States, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Fourth Amendment:

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 7602 of the Internal Revenue Code:

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.